Supreme Court, U.S.
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No. 95-1069

In The
Supreme Court of the United States
October Term, 1996

HOFFMAN CONTROLS CORPORATION,
Petitioner,

v.

BURGESS-SAIA, INC. AND LANDIS & GYR, INC.
Respondents.

Petition For Writ Of Certiorari
From The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the panel of the Fifth Circuit Court of Appeals err by affirming, in conflict with established federal precedent of this Court, the district court's summary judgment for Respondent on the basis of *res judicata* where Respondent failed to discharge its initial burden under Fed. R. Civ. Proc. 56 of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law on each element of Respondent's affirmative defense?

2. Did the panel of the Fifth Circuit Court of Appeals err by holding, in conflict with established federal precedent of this Court, that Petitioner was required to respond and contest Respondent, Landis & Gyr's, summary judgment claim of privity where Respondent failed to establish the absence of a genuine issue of material fact as to every element of its affirmative defense?

3. Did the panel of the Fifth Circuit Court of Appeals err by affirming, in conflict with the established law of *res judicata*, the district court's summary judgment for Respondent on the basis of *res judicata* where Respondent failed to establish *res judicata* privity as a matter of law?

PARTIES

Pursuant to Rules 14.1(b) and 29.1, Petitioner certifies that the following is a complete list of all parties to this proceeding, including parent companies and subsidiaries (except wholly owned subsidiaries):

1. Hoffman Controls Corporation[1] — Petitioner/Appellant.

2. Burgess-SAIA, Inc. — Respondent/Appellee.

3. Landis & Gyr, Inc. — Respondent/Appellee.

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[1] Pursuant to Rule 29.1, Petitioner certifies that Hoffman Controls Corporation has no parent or subsidiary company.

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REPORTS OF OPINIONS

A copy of the United States Court of Appeals for the Fifth Circuit Opinion and Judgment is attached hereto as Appendix 2. The United States Court of Appeals for the Fifth Circuit affirmed the United States District Court for the Northern District of Texas Dallas Division. A copy of the Judgement of the United States District Court for the Northern District of Texas Dallas Division is attached hereto as Appendix 3. A copy of the Opinion of the United States District Court for the Northern District of Texas Dallas Division is attached hereto as Appendix 4. A copy of the Finding of Fact and Conclusions of Law of the 44th Judicial District Court of Dallas County, Texas is attached hereto as Appendix 5. A copy of the Judgment of the 44th Judicial District Court of Dallas County, Texas is attached hereto as Appendix 6.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its decision affirming the District Court for the Northern District of Texas — Dallas Division's decision granting summary judgment for Respondents on October 2, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Rule 56 of the Federal Rules of Civil Procedure (*see*, Appendix 7.)

STATEMENT OF THE CASE

In September of 1983, Petitioner, Hoffman Controls Corporation ("Petitioner" or "Hoffman") issued a purchase order to Respondent, Landis & Gyr, Inc. ("Respondent" or "Landis") for two different series of gearbox assemblies: the "Ba" series and "F" series.[2] Thereafter, Hoffman purchased, over the course of many years, over 13,500 Ba gearboxes pursuant to different invoices issued on different dates. (Tr. Vol. 7, pp. 104-109 and 111-116, p. 16). On March 23, 1987 Landis sold the division of its company which distributed the gearboxes to Burgess-SAIA, Inc. ("Respondent or "Burgess") under an "Asset Sale Agreement."

Hoffman incorporated the Ba gearbox into a heating, ventilation and air conditioning device referred to as the 201-5A actuator.[3] *Id.* The F gearbox was incorporated into a Hoffman Controls'

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[2] For purposes of brevity, the "Ba series motor gearbox assembly" will hereinafter be referred to simply as the "Ba gearbox" and the "F series motor gearbox assembly" shall be referred to as the "F gearbox."

[3] The 201-5A heating, ventilation and air conditioning control device will hereinafter simply be referred to as the "201-5A actuator."

heating, ventilation and air conditioning actuator identified as the 201-7A actuator.[4] *Id.*

Beginning in 1989, Hoffman noticed an acceleration in its customers' return of the 201-5A actuator — which incorporated the Ba gearbox. *Id.* In order to attempt to determine the cause of the failure of the Hoffman 201-5A actuator which incorporates the Ba gearbox, Hoffman authorized its chief engineer, William Bowman, to conduct a life test on the 201-5A actuator and Ba gearbox. (Tr. Vol. 7, pp. 104-116). On October 22, 1990, Mr. Bowman concluded his life tests of the Ba gearbox (the 6 minute motor) and reported his findings to the Chairman of the Board of Hoffman, Mr. Howard Byrnes. *Id.* On October 22, 1990, Mr. Bowman, on the basis of his tests, concluded that the failures in the Hoffman 201-5A actuator were occurring because the Ba gearbox sold to Hoffman by Landis would not continuously stall without failure as required by Hoffman's contract with Landis and that the inability of the Ba gearbox to continuously stall without failure resulted in the gears in the 201-5A actuator either stripping or locking up. *Id.*

By invoice dated December 20, 1990, Burgess-SAIA, Inc. ("Burgess") sold to Hoffman 500 F gearboxes which formed the basis of Burgess' collection judgment in state court. The invoice related to the F gearbox only, not the Ba gearbox. (Tr. Vol. 7, p. 115). The specific 500 F gearboxes purchased by Hoffman from Burgess in December of 1990 and made the basis of the Burgess state court sworn account claim did not fail and Hoffman does not contend in this action that the F gearboxes are defective. (Tr. Vol. 7, pp. 108, 109, 111-116).

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[4] The heating, ventilation and air conditioning product which incorporates the F gearbox and referred to as the 201-7A actuator will, for the purposes of brevity, hereinafter be referred to simply as the "201-7A actuator."

Burgess, not Landis, sued Hoffman in state court and claimed that Hoffman had failed to pay the December 20, 1990 invoice for F gearboxes. Hoffman did not contest Hoffman's refusal to pay the invoice. Landis was not a party to the state court action. The state court rendered a Judgment (Appendix 6) and entered findings and fact and conclusions of law (Appendix 5). Thereafter, in the instant action, Hoffman sued Respondents Burgess and Landis. Hoffman claimed that Landis sold Hoffman Ba gearboxes beginning in 1983 which were defective and which did not meet the specifications agreed to between the parties. Hoffman sought over $5,000,000.00 in damages. Burgess and Landis answered Hoffman's complaints in this action and asserted that Hoffman's claims concerning the Ba gearbox were barred by the affirmative defense of *res judicata*. Burgess and Landis filed Motions for Summary Judgment based upon their affirmative defense of res judicata arising out of a prior state court judgment in favor of Burgess (not Landis) against Hoffman on a debt of $10,000.00 for 500 F series gearbox assemblies sold in December 1990.[5]

Landis' Motion for Summary Judgment pursuant to res judicata was based upon Landis' contention that Landis was a "party in privity" with Burgess and that Landis was "sufficiently related" to Burgess to entitle Landis to stand in Burgess' shoes for purposes of res judicata. Landis offered no summary judgment evidence refuting as a matter of law the alleged fraudulent representations made by Landis' agents to Hoffman which induced Hoffman to purchase Ba gearboxes. Hoffman responded to Landis' motion by challenging Landis' failure to meet the necessary summary judgment requirements under Rule 56 of the Federal Rules of Civil Procedure. Specifically, Hoffman contended that because Landis failed to discharge its initial burden of

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[5] Landis (not Burgess) additionally moved for summary judgment based upon the statute of limitations. The District Court did not reach or rule on this Motion.

establishing each element[6] of its affirmative defense of *res judicata* as a matter of law, Hoffman, therefore, was not required to respond and offer evidence establishing a genuine issue of material fact.

On November 10, 1994, the United States District Court for the Northern District of Texas Dallas division, the Honorable Jerry Buchmeyer, granted both Burgess and Landis a Summary Judgment on the affirmative defense of *res judicata*. (App. 3 & 4). Hoffman perfected its appeal to the United States Court of Appeals for the Fifth Circuit on December 2, 1994. On October 2, 1995, a panel of the Fifth Circuit Court of Appeals, filed its Memorandum Decision affirming the District Court's grant of summary judgment on the affirmative defense of *res judicata*. (App. 2).

Hoffman contended in the district court and before the panel that Landis' "privity argument" was immaterial to the issues raised in Landis' Motion for Summary Judgment because Landis' privity argument was based on the erroneous premise that, for purposes of *res judicata*, a predecessor in interest is "in privity" with a successor in title. Because a predecessor is not in privity with a successor in title for *res judicata* purposes, Landis' argument must fail as a matter of law. The panel ignored Hoffman's "immaterial and irrelevant" response to Landis' "privity argument." The panel concluded that "Landis' privity was a material and relevant issue, as it is only through privity that Landis could benefit from the state court judgment." However, under the established law of *res judicata*, it is clear that a predecessor in interest is not in privity, for *res judicata* purposes, with its successor in title. The summary judgment evidence established that Landis' privity with Burgess is as a predecessor in interest, not a successor in interest. Hoffman contends that the panel

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[6] Hoffman contends that Landis failed to establish the element of privity for purposes of its summary judgment motion based on res judicata.

applied an erroneous summary judgment burden on Hoffman, the non-movant, by shifting the burden on Hoffman to refute Landis' affirmative defense of *res judicata*. Hoffman further contends that the panel erroneously construed the Burgess/Landis contract in applying the res judicata doctrine.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

This is an appeal of the Fifth Circuit's decision affirming the District Court's decision granting summary judgment for Landis pursuant to Federal Rule of Civil Procedure 56. The Fifth Circuit panel made serious errors in assigning the burdens of proof under Rule 56. The panel incorrectly applied the law under Rule 56 in requiring Petitioner to respond and refute Landis' summary judgment motion based on Landis' affirmative defense of *res judicata*. The Fifth Circuit's opinion is contrary and contradictory to well established rules of law and decisions of numerous federal courts of appeal, federal district courts, and of this Court.

A review by this Court of the Fifth Circuit panel's decision is warranted in this case because the opinion of the panel conflicts with and holds differently from prior decisions of the Fifth Circuit, numerous other courts of appeals, Texas federal district courts and from opinions of this Court on questions relating to the burden of proof under Federal Rule of Civil Procedure 56. The Fifth Circuit panel's holding is in direct conflict with this Court's interpretation of Rule 56 and conflicts with the following opinions of this Court and the Fifth Circuit:

1. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53 (1986);

2. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 90 S.Ct. 1598 (1970).

3. *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir. 1994);

4. *Russ v. International Paper Co.*, 943 F.2d 589 (5th Cir. 1991).

5. *Hibernia Nat. Bank v. Admin. Central Sociedad Anonima*, 776 F.2d 1277, 1279 (5th Cir. 1985);

6. *John v. State of La. (Bd. of Trustees for State Colleges and Universities)*, 757 F.2d 698, 708 (5th Cir. 1985);

7. *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981);

8. *Securities & Exchange Comm'n v. Spence & Green Chem. Co.*, 612 F.2d 896 (5th Cir.), *cert. denied*, 449 U.S. 1082 (1981);

9. *Montgomery v. Boshears*, 698 F.2d 739, 741 (5th Cir. 1983);

10. *Benton-Volvo-Metairie, Inc. v. Volvo Southwest, Inc.*, 479 F.2d 135, 138-39 (5th Cir. 1973).

In the decisions of *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, (1986) and *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598 (1970), this Court addressed in detail the law of summary judgments pursuant to Rule 56. Specifically, *Celotex* and *Adickes*, clarified the shifting burdens of proof under Rule 56. In both cases, this Court confirmed that under Rule 56, the moving party has the initial burden of showing the absence of a genuine issue as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. at 323; *Adickes v. S.H. Kress & Co.*, 398 U.S. at 157. As stated by this Court in Adickes:

> where the evidentiary matter in support of [a summary judgment] motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented.

Adickes v. S.H. Kress & Co., 398 U.S. at 157 (quoting the Advisory Committee Notes on the 1963 Amendment to Rule 56).

Thus, under the stringent summary standards adopted by this Court, Landis, as movant, bears the initial burden of proof and Hoffman, as non-movant, is required to respond to Landis' motion *only after* Landis meets its initial burden. As the record in this case establishes, Landis' summary judgment motion does not conclusively establish, as a matter of law, an essential element required to entitle Landis to summary judgment on the ground of res judicata — *i.e.*, the existence of sufficient and legally proper "privity" between Landis and Burgess. Legally proper privity for purposes of *res judicata* must be established before Landis can claim res judicata as a result of Burgess' debt judgment in state court against Hoffman.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN *CELOTEX CORP. V. CATRETT* AND *ADICKES V. S.H. KRESS & CO.* AND ESTABLISHED FIFTH CIRCUIT PRECEDENT UNDER FEDERAL RULE OF CIVIL PROCEDURE 56

Initially, at least, the record must be reviewed to determine if Landis has fulfilled the stringent summary judgment requirements for establishing, as a matter of law, that there are no genuine issues of material fact in dispute as to Landis' affirmative defense of res judicata. Under federal law, all reasonable inferences that can be deduced from the pleadings, affidavits and other summary judgment evidence must be resolved in favor of the non-movant, Hoffman. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356-57 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2513 (1986). The record fails to conclusively determine, as a matter of law, facts sufficient to support summary judgment for Landis based on the affirmative defense of res judicata.

Rule 56(c) of the Federal Rules of Civil Procedure sets forth the standard for summary judgment. It provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(c). A party who moves for summary judgment under Rule 56 must meet this exacting standard. When the movant is seeking summary judgment on the basis of an affirmative defense to which the movant bears the ultimate burden of proof at trial, as in this case, the movant must establish the absence of a genuine issue of material fact as to every element of the affirmative defense whether the non-movant responds or not. *Crescent Towing & Salvage Co., Inc. v. M/V Anax*, 40 F.3d 741, 744 (5th Cir. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53 (1986)); *Brenham Community Protective Ass'n. v. U.S. Depot of Agric.*, 893 F.Supp. 665, 668 (W.D. Tex. 1995); *Marshall v. Hobs. Auth. of the City of Taylor*, 866 F.Supp. 999, 1002 (W.D.Tex. 1994), *aff'd*, 51 F.3d 1045 (5th Cir. 1995); *Bob Hamric Chevrolet, Inc. v. IRS*, 849 F.Supp. 500, 507 (W.D. Tex. 1994); *see also, Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). In other words, Landis must establish the affirmative defense as a matter of law such that no reasonable jury could enter a verdict for the non-movant. Any doubt as to the existence of a genuine issue of material fact must be resolved by the court against the movant. *See, Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986).

Only *after* Landis satisfies this onerous burden, does the burden shift to Hoffman to proffer evidence sufficient to create a genuine issue of material fact as to any element essential to the affirmative defense. As stated in Rule 56(e):

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may

> not rest upon the mere allegations or denials of his pleading but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. *If he does not so respond, summary judgment, if appropriate, shall be entered against him.*"

Fed. R. Civ. Proc. 56(e) (emphasis added). Thus, it is absolutely clear under the law of this Court and the Fifth Circuit, that pursuant to the shifting burdens contemplated under Rule 56, Hoffman is under no obligation to respond to a motion for summary judgment unless Landis discharges its initial burden of showing that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Montgomery v. Boshears*, 698 F.2d 739, 741 (5th Cir. 1983); *Bluebonnet Sav. Bank v. FDIC*, 891 F.Supp. 332, 336 (N.D. Tex. 1995); *Dallas Fire Fighters Ass'n v. City of Dallas, Tex.*, 885 F.Supp. 915, 920 (N.D. Tex. 1995); *Dorety v. Avondale Shipyards of Texas, Inc.*, 672 F.Supp. 962, 963 (S.D. Tex. 1987).

If Landis fails to discharge its burden, summary judgment must be denied — even if Hoffman has not responded to the motion at all. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994); *Hibernia Nat'l Bank v. Admin. Central Sociedad Anonima*, 776 F.2d 1277, 1279 (5th Cir. 1985); *John v. State of La. (Bd. of Trustees for State Colleges and Universities)*, 757 F.2d 698, 708 (5th Cir. 1985); *see also, Securities & Exchange Comm'n v. Spence & Green Chem. Co.*, 612 F.2d 896 (5th Cir.), *cert. denied*, 449 U.S. 1082 (1981) ("A party opposing summary judgment need not respond or file counter-affidavits or other evidentiary materials under Rule 56 if the affidavits and other evidence of the moving party are intrinsically insufficient to establish its entitlement to summary judgment"); *Envtl. Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981) ("[t]he non-moving party is not required to respond unless and until the moving party has properly supported the motion with sufficient

evidence"); *Benton-Volvo-Metairie, Inc. v. Volvo Southwest, Inc.*, 479 F.2d 135, 138-39 (5th Cir. 1973).

Thusly, the panel's conclusion that "Hoffman did not contest Landis' claim of privity" is inapposite to the summary judgment procedures. Hoffman did contest Landis' claim of proper and legally binding privity for purposes of res judicata. Hoffman did not, however, contend that Landis had no privity since the evidence established that there was an asset sale agreement which created *contractual* privity. However, Hoffman contended that the privity was not the type of privity that would entitle Landis to the benefits of Burgess' res judicata claim and, therefore, that the type of privity asserted by Landis was irrelevant and immaterial to the legal analysis Landis hoped to achieve. The panel erroneously concluded that Hoffman had the burden of responding to Landis' motion even though Landis did not meet its initial burden. Landis failed to show that the asset sale agreement, dated March 23, 1987 between Landis and SAIA-Inc., entitled Landis to argue res judicata through its "privity" with Burgess. The panel's analysis is flawed and the ultimate conclusion reached by the panel is contrary to longstanding federal precedent concerning summary judgment standards and the shifting burdens under Rule 56.

In *Russ v. International Paper Co.*, 943 F.2d 589 (5th Cir. 1991), *cert. denied*, 503 U.S. 987 (1992), the Fifth Circuit discussed the burdens each party must carry on a motion for summary judgment in light of this Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317. 943 F.2d at 591. In *Russ*, the court explained that *Celotex* is commonly cited out of context for the proposition that once a party moves for summary judgment the non-moving party must respond with evidence establishing genuine issues of fact in order to defeat the motion. *Id.* Dismissing such argument as a "common misinterpretation," the Fifth Circuit noted that "simply filing a summary judgment motion does not immediately compel the party opposing the motion to come forward with evidence demonstrating material issues of facts." *Id.*

The court further explained that *Celotex* did not change the law under Rule 56 as to which party carries the initial burden on a motion for summary judgment. On this point, the Fifth Circuit stated:

> *Celotex* makes clear that before the non-moving party is required to produce evidence in opposition to the motion, the moving party must first satisfy its obligation of demonstrating that there are no factual issues warranting trial.
>
> > 'Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.'
>
> Celotex, 477 U.S. at 323, 106 S.Ct. at 2553. The Court specifically approved its earlier decision in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 (1970) which stated that the party opposing a motion for summary judgment must respond only after the moving party meets its initial burden.

943 F.2d at 591.

Applying Supreme Court and Fifth Circuit law to the facts of this case, it is clear that the summary judgment granted by the District Court and affirmed by a panel of the Fifth Circuit is erroneous as a matter of law whether Hoffman responded to the motion or not. It is also clear that the decision of the panel of the Fifth Circuit affirming the District Court's summary judgment misapplies and conflicts with existing Fifth Circuit and United States Supreme Court precedent. Because the record and summary judgment evidence presented by Landis cannot establish the absence of any genuine issues of material fact and cannot establish Landis' entitlement to summary judgment as a matter of law,

the panel's decision is erroneous and contrary to established precedent of the Fifth Circuit and this Court.

Under Fifth Circuit law, Landis, in seeking summary judgment on the basis of the affirmative defense of *res judicata* — an issue on which Landis would bear the ultimate burden of proof at trial — is required to establish every element of *res judicata* as a matter of law. *See, Crescent Towing & Salvage Co., Inc. v. M/V Anax*, 40 F.3d 741, 744 (5th Cir. 1994). Until Landis satisfies this stringent and onerous burden, non-movant, Hoffman, has no duty to contest Landis' motion and no obligation to proffer evidence sufficient to create a genuine issue of material fact. In fact, under Fifth Circuit law, Hoffman, as the non-movant, has no obligation to respond whatsoever *unless and until* Landis, as movant, satisfies its initial burden and establishes each element of res judicata as a matter of law. Because Landis failed to properly support its motion for summary judgment with sufficient evidence to establish an essential element of its affirmative defense, *i.e.* privity, summary judgment was improper regardless of whether Hoffman responded to Landis' privity claim or not. Contrary to the panel's reasoning, Hoffman was not required to contest privity at the district court level because Landis, on whom the initial burden rested, failed to establish privity for res judicata purposes as a matter of law.

II. THE DECISION BELOW CONFLICTS WITH THE ESTABLISHED LAW OF PRIVITY FOR PURPOSES OF *RES JUDICATA*.

In order to discharge its initial burden of proof under Rule 56, Landis was required to establish each of the following elements of *res judicata* as a matter of law:

(1) identical parties or *privies* in both suits;

(2) the prior judgment must have been rendered by a competent tribunal; and

(3) the claim must have been a claim litigated in the prior action.

Rosedale Partners Ltd. v. Resolution Trust Corp., 882 S.W.2d 622 (Tex. App. — Corpus Christi 1994, writ denied) (emphasis added); *see, Texas Water Rights Comm'n v. Crow Ironworks*, 582 S.W.2d 768 (Tex. 1979). However, as the summary judgment record establishes, Landis failed to show, as a matter of law, that the parties were in privity for *res judicata* purposes. Under the law of *res judicata*, a non party to the previous suit (Landis) is in privity with a party (Burgess) in three instances:

(1) If the non party is a *successor* in interest to the party's interest in the property;

(2) If the non party controlled the prior litigation; or

(3) If the party adequately represented the non party's interest in the prior proceeding.

Benson & Ford, Inc. v. Wanda Petroleum Co., 833 F.2d 1172 (5th Cir. 1987); *see also, Southwest Airlines Co. v. Texas Int'l Airlines, Inc.*, 546 F.2d 84 (5th Cir.), *cert denied*, 434 U.S. 832, 98 S.Ct. 117, 54 L.Ed.2d 93 (1977); *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183 (5th Cir. 1990).

In its motion for summary judgment, Landis claimed it was in privity with Burgess for *res judicata* purposes, based on a succession in interest relationship — the first item above. Landis maintained that by proffering an Asset Sale Agreement dated March 23, 1987 between Landis and SAIA, Inc. it established with sufficient evidence "the fact and legal ramifications of privity between Landis and Gyr and its purchaser/successor in interest (*i.e.*, Burgess)." Landis' argument, however, was erroneous as a matter of law because the contractual privity created by such agreement is irrelevant and immaterial to the privity required for *res judicata* purposes. According to well-established law, privity for *res judicata* purposes based on a successive relationship is not

reciprocal in operation between predecessor and successor. *See,* Restatement (Second) of Judgments § 43 cmt. e; 1B Moore's Federal Practice ¶ 0.411 (1993). To the contrary, while a successor is privy in estate to the predecessor, the reverse is not true unless there has been a retransfer from the successor to the predecessor. *Id.; see also, Litton ABS v. Red Yellow Cab Co.,* 411 N.E. 2d. 808, 811 (Ohio Ct. App. 1978); *Howell Hydrocarbons, Inc. v. Adams,* 897 F.2d at 188; *Southwest Airlines Co. v. Texas Int'l,* 546 F.2d at 84.

Simply stated, a predecessor in interest cannot claim the rights and privileges of the successor in interest. A judgment against the successor in interest does not estop a cause of action against the predecessor in interest under *res judicata. See, Freeman on Judgments* 969 (5th ed. 1925); 1B *Moore's Federal Practice* ¶ 0.411 (1993); Restatement (Second) on Judgments § 89 cmt. e. For *res judicata* purposes, privity flows only one way. Thus, while the Asset Sale Agreement between Landis and SAIA may evidence the existence of contractual privity for business purposes, it does not evidence the type of privity necessary to establish *res judicata* as a matter of law. As such, the Asset Sale Agreement is clearly insufficient evidence to establish the element of privity, and therefore, insufficient to discharge Landis' initial burden of establishing each essential element of *res judicata* as a matter of law under Rule 56.

Accordingly, because the only evidence proffered by Landis to establish the element of privity for *res judicata* purposes was the Asset Sale Agreement and because this evidence was intrinsically insufficient to establish *res judicata* privity as a matter of law, Landis failed to discharge its initial burden, and therefore, Hoffman Controls as the non-movant had no obligation to respond to Landis' privity argument. *See, Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir. 1994); *Hibernia Nat'l Bank v. Admin. Central Sociedad Anonima,* 776 F.2d 1277, 1279 (5th Cir. 1985); *John v. State of La. (Bd. of Trustees for State*

Colleges and Universities), 757 F.2d 698, 708 (5th Cir. 1985); *Securities & Exchange Comm'n v. Spence & Green Chem. Co.*, 612 F.2d 896 (5th Cir.), *cert. denied*, 449 U.S. 1082 (1981); *Envtl Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981). Thusly, the panel violated clearly established Fifth Circuit and United States Supreme Court precedent by shifting the burden in a summary judgment proceeding to the non-movant (Hoffman) where the movant (Landis) clearly had the burden of establishing its entitlement to summary judgment on an affirmative defense and clearly failed to do so. The panel's decision required Hoffman to respond to Landis' Motion for Summary Judgment on the affirmative defense raised by Landis even though Landis failed, as a matter of law, to establish its entitlement to a summary judgment on res judicata. The panel's erroneous shifting of the burden to Hoffman violates well established United States Supreme Court and Fifth Circuit precedent and clearly leads to an erroneous decision.

CONCLUSION

Based on the above argument and authorities, the decision of the panel of the Fifth Circuit Court of Appeals affirming the District Court's summary judgment on the basis of res judicata is clearly improper and erroneous under existing Fifth Circuit and United States Supreme Court precedent. In addition, the panel's conclusion that Hoffman was required to contest Landis' privity claim in the District Court despite Landis' failure to discharge its initial summary judgment burden, is clearly contrary to existing Fifth Circuit and United States Supreme Court law.

For these reasons, Petitioner Hoffman Controls Corporation prays that this Court grant petitioner's Petition for Writ of Certiorari and reverse the lower decisions.

Respectfully submitted,

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Attorney for Petitioner
Hoffman Controls Corporation

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-11102

HOFFMAN CONTROLS CORPORATION,
Plaintiff-Appellant,

VS.

BURGESS-SAIA, INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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ORDER:

IT IS ORDERED that appellant's unopposed motion for extension of time to and including November 6, 1995, within which to file its Petition for Rehearing and Suggestion for Rehearing En Banc is DENIED.

/s/ JERRY E. SMITH
Jerry E. Smith
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 94-11102

HOFFMAN CONTROLS CORPORATION,
Plaintiff-Appellant,

VS.

BURGESS-SAIA, INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas (3:92-CV-2122-R)

Before SMITH, BARKSDALE, and BENAVIDES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[1]

Hoffman Controls, Inc, ("Hoffman"), appeals a summary judgment in favor of Burgess-SAIA, Inc., and Landis & Gyr, Inc. Finding Hoffman's claims barred by res judicata, we affirm.

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Hoffman manufactures heating, ventilating, and air conditioning devices. Two of its products, the 201-5A and 201-7A actuators, require specialized gearbox assemblies. In 1983, Landis began supplying Hoffman with two specialized gearbox assemblies manufactured by Burgess. The two assemblies were the Ba gearbox, which Hoffman used in the 201-5A actuator, and the F gearbox, which Hoffman used in the 201-7A actuator. In 1987, Burgess merged with SAIA and replaced Landis as Hoffman's supplier.

Beginning in 1989, Hoffman's customers began to return an increasing number of failed 201-5A actuators. Hoffman blamed the failures on the inability of the Ba gearboxes to stall continuously without failure, a feature Hoffman required in its agreement with Landis and Burgess. Hoffman filed a claim in state court against Burgess seeking damages for the faulty gearboxes, alleging they were defective. Hoffman did not specify whether the defective models belonged to the Ba or F series.

Burgess retorted with a counterclaim for payment on a 1990 invoices for 500 F series gearboxes. In response to the counterclaim, Hoffman raised affirmative defenses of breach of warranty and breach of contract resulting from defective gearboxes.

At trial, Hoffman dismissed its original claim without prejudice. It failed to submit a sworn denial to the counterclaim and was therefore barred by Texas law from raising its affirmative defenses. Burgess prevailed on the counterclaim.

Subsequently, Hoffman filed this claim in federal court against both Landis and Burgess, alleging only that the Ba gearboxes were defective. The district court granted summary judgment on the ground that the state court action was res judicata with respect to this claim. We reversed (*"Hoffman I"*), instructing the district court to take a closer look at the facts to determine whether the two claims arose from the same transac-

tion or occurrence under the standard of *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627 (Tex. 1992). On remand, the district court applied our instructions and granted summary judgment for the defendants.

II.

The question before us is the narrow one of whether the state court counterclaim and this claim involve the same transaction under the *Barr* standard. *Hoffman I* resolved most of the issues in this case and remanded solely for application of *Barr*. We therefore need consider only those arguments that address the application of the *Barr* test. Applying *de novo* review, *Hanks v. Transcontinental Gas Pipe Line Corp.*, 953 F.2d 996, 997 (5th Cir. 1992), we affirm.

In *Barr*, the court adopted the transactional approach to claims preclusion set forth in the Restatement of Judgments. Under that approach, the determination that two claims arise from the same transaction "is to be made pragmatically, 'giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a trial unit conforms to the parties' expectations or business understanding or usage.' " *Barr*, 837 S.W.2d at 631 (quoting from RESTATEMENT OF JUDGMENTS § 24(2)).

Under *Barr*, this claim and Burgess's state court counterclaim do involve the same transaction. It is true that the counterclaim involved only F gearboxes, while this action involves only Ba gearboxes. Hoffman's purchase of F gearboxes, however, was closely related to its purchase of Ba gearboxes: Hoffman negotiated to purchase both types of gearboxes at the same time.

Though technically different, the gearboxes performed substantially the same function. The parties treated both gearboxes as a single production throughout their relationship; Hoffman

treated both as a single product in the state court litigation by failing to distinguish them in its complaint. We conclude that res judicata bars Hoffman's action because it involves the same transaction as the state court counterclaim.

Hoffman contends that even if res judicata bars its suit against Burgess, it may still maintain an action against Landis, which was not a party to the state court suit. The district court nonetheless found that Landis could benefit from the claim-preclusive effect of Burgess's counterclaim because it was in privity with Burgess. Hoffman did not contest Landis's claim of privity in the district court and therefore cannot raise this issue on appeal. *See Noritake Co. v. M/V Hellenic Champion*, 627 F.2d 724, 732 (5th Cir. 1980) (holding that appellate court will not consider issue not raised in trial court); *Bliss v. Equitable Life Assurance Soc'y*, 620 F.2d 65, 70 (5th Cir. 1980); *Excavation & Erectors, Inc. v. Bullard Eng'rs, Inc.*, 489 F.2d 318, 320 (5th Cir. 1973) (same).

Hoffman contends that it had no duty to contest Landis's privity argument because that argument was "immaterial and irrelevant to any issue raised in [Landis's] Motion For Summary Judgment." Hoffman, however, points to no legal authority holding that a party may choose to ignore an argument it deems "immaterial and irrelevant" without waiving its right to contest the issue later. Even if Hoffman's position were correct, Landis's privity was a material and relevant issue, as it is only through privity that Landis could benefit from the state court judgment. We therefore conclude that the state court action precludes Hoffman from maintaining a claim against either Landis or Burgess.

AFFIRMED. *October 2, 1995*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HOFFMAN CONTROLS CORPORATION,	
VS.	3:92-CV-2122-R
BURGESS-SAIA, INC., LANDIS & GYR, INC. AND SAIA SWITZERLAND	

JUDGMENT

For the reasons stated in this Court's Memorandum Opinion, final judgment is entered in favor of the Defendants, Burgess-SAIA, Inc., Landis & Gyr, Inc. and SAIA Switzerland, with costs taxed against Plaintiff, Hoffman Controls Corporation.

ENTERED: NOVEMBER 9, 1994

/s/ JERRY BUCKMEYER
Jerry Buchmeyer, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HOFFMAN CONTROLS CORPORATION,	
VS.	3:92-CV-2122-R
BURGESS-SAIA, INC., LANDIS & GYR, INC. AND SAIA SWITZERLAND	

MEMORANDUM OPINION AND ORDER

Now before this Court are the Motions for Summary Judgment filed by Defendants Burgess-SAIA, Inc., and Landis & Gyr on the issue of res judicata, and the Motions for Partial Summary Judgment filed by Defendants Burgess-SAIA, Inc., and Landis & Gyr, on the issue of the applicability of the statute of limitations.

FACTUAL BACKGROUND

This case arose from defects in motor gearbox assemblies ("motors") sold by Defendants to Hoffman Controls Corporation ("Hoffman"). Hoffman is involved in the design and manufacture of mechanical controls, including the manufacture of variable air control units. SAIA-AG manufactures motors in Switzerland. Initially, SAIA-AG was represented in the United States by Landis & Gyr, Inc. ("Landis & Gyr"). In 1986, SAIA, Inc., an English company, bought SAIA-AG from its parent company. In 1987, SAIA, Inc. purchased Landis & Gyr's industrial components division pursuant to an Asset Purchase Agreement, thereby acquiring the right to distribute SAIA products. SAIA, Inc. later merged with Burgess Holdings PLC to form Burgess-SAIA, Inc. ("Burgess"). Thereafter Burgess distributed SAIA products throughout the United States.

In the early 1980's, Hoffman began inquiring about motors that had the capability of maintaining a stalled condition. SAIA, through its U.S. representatives, recommended two types of motors: a "Ba" series and an "F" series. Both needed special adjustments to meet Hoffman's requirements. On or about June 3, 1983, Landis & Gyr sent to Hoffman five Ba series and five F series sample motors manufactured by SAIA. Hoffman personnel tested these units, and around September 20, 1983, Hoffman issued a purchase order for 500 Ba and 500 F series motors. This purchase order indicated that Hoffman required a motor "capable of stall in both directions without failure." At the end of 1983, both the Ba series and the F series were field tested.

After the field tests, representatives of Hoffman and SAIA correspondence and met several times to discuss mechanical specifications and pricing on both the Ba and F series. Sometime in 1984 or 1985, Hoffman began production of air control units with SAIA motors. Hoffman incorporated the Ba series motor into its 201-5A actuator, and the F series motor into its 201-7A actuator. In 1989, Hoffman noticed a trend of failures in its 201-5A actuators, and traced the cause to a defect in the Ba motor gearbox assemblies. Hoffman has experienced no problems with actuators containing F series motor gearbox assemblies.

On July 19, 1991, Hoffman filed suit against Burgess in Texas state court, alleging breach of contract and breach of warranty claims. The complaint did not specify which series was allegedly defective. Burgess counterclaimed for payment on a December 20, 1990 invoice for delivery of 500 F motor gearbox assemblies. In its answer to Burgess's counterclaim, Hoffman raised breach of contract and breach of warranties as affirmative defenses. On the day of trial, October 1, 1992, Hoffman dismissed its claims without prejudice. The state court found for Burgess on its counterclaim, based on Rule 185 of the Texas Rules of Civil Procedure. In short, Burgess had submitted a sworn account, to which Hoffman did not respond with a sworn denial. This failure

to submit a sworn denial prevented Hoffman from contesting the validity of Burgess's claim, and judgment was entered for Burgess.

On October 19, 1992, Hoffman filed the present action against Burgess and Landis & Gyr in federal district court. Hoffman claims breach of contract, breach of warranty, misrepresentation, violation of the Texas Deceptive Trade Practices Act, fraud, violation of the Uniform Commercial Code, and fraudulent concealment. Hoffman contends that all of its claims arise from the defective Ba series motors, not the F series.

Burgess and Landis & Gyr moved for summary judgment on the grounds that Hoffman's claims were barred by the doctrine of res judicata. This court granted their motion, on the theory that Hoffman's claims arose from the same "transaction or occurrence" as the prior action adjudicated in state court. Hoffman appealed this Court's decision, and the Fifth Circuit reversed and remanded, instructing this court that a grant of summary judgment on the ground of res judicata must contain a closer look at the facts to determine whether the second claim arises from the same "transaction or occurrence" as the first. Burgess once again moves for summary judgment, on the same grounds raised earlier.

ANALYSIS

Res Judicata

Res judicata, or claim preclusion, bars the relitigation of a cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence, should have been turned in a prior suit.[2] Under the doctrine of claim preclusion, a subsequent suit having an identity of parties, issues, and subject matter

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[2] *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627,628 (Tex. 1992); *Gracia v. RC Cola-7-UP Bottling Co.*, 667 S.W.2d 517, 519 (Tex. 1984); *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984).

merges into the final judgment in the prior suit.[3] Claim preclusion embodies policies reflecting the need to bring all litigation to an end, and prevent vexatious litigation and double recovery, maintain the stability of court decisions, and promote judicial economy.[4] To advance these policies, claim preclusion prohibits a party from splitting a cause of action.[5]

When applying the doctrine of res judicata, the federal court should look to the effect that a Texas state court would give to a prior Texas state court judgment.[6] The Supreme Court of Texas, in *Barr v. Resolution Trust Corporation*, reaffirmed the "transactional" approach to claim preclusion. A final judgment in a prior action will bar a subsequent suit on the transaction, or series of connected transactions, out of which the prior action arose.[7] The determination of whether res judicata is applicable is similar to the determination of whether the subsequent claim can be characterized as a compulsory counterclaim.[8] Rule 97 of the Texas Rules of Civil Procedure defines a compulsory counterclaim as any claim that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim."[9] The Restatement of Judgments provides that in determining what constitutes a transaction, courts should give weight to "whether the facts are related in time, space, origin, or motivation, whether they form a

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[3] *Bonniwell*, 663 S.W.2d at 818 (citing *Texas Water Rights Comm's v. Crow Iron Works*, 582 S.W.2d 768, 771 (Tex. 1979)); *Abbott Lab. v. Gravis*, 470 S.W.2d 639, 642 (Tex 1971).

[4] *Barr*, 837 S.W.2d at 629.

[5] *Id.*

[6] *Schmueser v. Burkburnett Bank*, 937 F.2d 1025, 1031 (5th Cir. 1991).

[7] 837 S.W.2d at 631.

[8] *See*, Tex. R. Civ. P. 97.

[9] 837 S.W.2d at 630. *See* Tex. R. Civ. P. 97(a).

convenient trial unit. and whether their treatment as a trial unit is consistent with the parties' expectations or business understanding or usage."[10] Thus, in determining whether the present suit is precluded, this Court must examine the factual basis of the claim in the prior litigation and determine whether the present claims arise from the same transaction or series of transactions.[11]

Plaintiffs argue that because the prior litigation involved an invoice for F series motors, while the present litigation involves alleged defects in the Ba series, the facts are completely unrelated, and res judicata should not apply. Defendants counter that the business relationship between Hoffman and Burgess has always involved both the Ba and F series motors, and to say that the two are unrelated is a mischaracterization. According to defendants the business dealings involving the Ba and F series were so intertwined that they constitute a related series of transactions, to which res judicata should apply.

In deciding the appeal of this Court's first grant of summary judgment, the Fifth Circuit expressed misgivings about our "lack of concern with the underlying facts of the dealings between Burgess and Hoffman."[12] On remand, the Fifth Circuit instructed this Court to "more carefully and specifically examine how — if at all — transactions spanning over many years and involving different series of gearbox assemblies are so related as to constitute the same transaction for res judicata purposes."[13]

Thus, the decision of this Court rests on how widely or narrowly we define the scope of the transaction, based on the relatedness of the facts underlying both claims. In the first state

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[10] *Id.* at 631 (quoting Restatement of Judgments § 24(2)).1

[11] *Id.* at 630.

[12] *Hoffman v. Burgess-SAIA*, No. 93-1775, slip op. at 6 (5th Cir. filed Apr. 15, 1994).

[13] *Id.* at 7.

court action, Burgess counterclaimed for payment for a shipment filling Purchase Order 8922. This purchase order was for 500 F series motors. We can trace the "origin" of Purchase Order 8922 all the way back to June 3, 1983, when Landis & Gyr sent to Hoffman five Ba series and five F series sample motors. These two products made up the entirety of the business relationship between Hoffman and Burgess. Since that time, Hoffman, SAIA, and SAIA's U.S. representatives had engaged in ongoing discussions and negotiations about Ba and F series mechanics, specifications and pricing. No evidence has been presented that these discussions pertained solely to either Ba or F series motors. Rather, deposition testimony indicates that meetings were held to discuss specifications or pricing of the Ba and F series together.

While the mechanical structure and specifications of the two series may have been different,[14] they performed the same function. They may be compared to two pairs of eyeglasses, each with different prescriptions and frames, but both created at the request of one customer, with that customer's input as to design and pricing. If we allowed Hoffman to defend a suit as to one (the F series), and then later bring a suit as to the other (the Ba series), it would be similar to allowing a customer to bring separate suits for his two pairs of eyeglasses. Claim preclusion exists specifically to prevent such splitting of claims.[15]

The pleadings in the state court case are also evidence of the parties expectations, another consideration mentioned in *Barr* to

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[14] The differences between the two motors was as follows: The transmission ratio for the Ba series was 1,800 to 1, and 4000 to 1 for the F series. The running torque was represented to be 162 OZ-IN for the Ba series, and 283 OZ-IN for the F series. The Ba series incorporated a combination of plastic and metal gears, while the F series utilized only metal gears. The expected life of the F series was represented to be much greater than the Ba series.

[15] *Barr,* 837 S.W.2d at 629.

be used in determining what constitutes a transaction.[16] Hoffman asserted breach of contract and breach of warranty as affirmative defenses against Burgess's counterclaim. From this pleading strategy, it is reasonable to infer that the treatment of the entire course of dealing on the Ba and F Series as a Series as a convenient trial unit was within the expectations of the parties in the case. The Fifth Circuit has warned this Court that "[w]hether Hoffman's claims asserted in state court were compulsory or permissive counterclaims cannot, in other words, be determined solely by Hoffman's pleading strategy.[17] However, this warning does not prevent the consideration of Hoffman's pleading strategy as *one* of the factors enunciated in *Barr*.

Thus, considering the close relationship between Ba and F series in the dealings between Hoffman and Burgess, the convenience of treating the claims as a convenient trial unit, and the parties' expectations, as evidenced by their pleading strategies, this court finds that Hoffman's claims arise from the same transaction, or series of transactions, out of which Burgess' state court counterclaims arose. Thus, the present claims are barred by the doctrine of res judicata and Burgess's Motion for Summary Judgment is hereby GRANTED.

Res judicata is applicable to parties to the original action, and to their privies as well.[18] While Burgess was a party to the state court action, Landis & Gyr was not. Thus, they are only protected by the res judicata effect of the previous adjudication if they were in privity with a party to that case. Landis & Gyr asserts that it is in privity with Burgess, and therefore entitled to

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[16] *Id.* at 631.

[17] *Hoffman v. Burgess-SAIA*, No. 93-1775, slip op. at 6.

[18] *Getty Oil Co. v Insurance Co. of N. Am.*, 845 S.W.2d 794,800 (Tex. 1992), *cert. denied, Youell & Cos. v. Getty Oil Co.* 126 L.Ed.2d 45, 114 S.Ct. 76 (1993).

summary judgment as well. Hoffman does not contest the claim of privity.

Those who are in privity with a party may include persons whose interests are represented by the party, successors in interest, and persons who exert control over the action.[19] Because Landis & Gyr's Industrial Control Division was sold to SAIA, Inc. under an Asset Purchase Agreement, and SAIA, Inc. merged with Burgess Holdings PLC to form Burgess-SAIA, Inc., Landis & Gyr's interests were adequately represented by Burgess. Thus, Landis & Gyr and Burgess are in privity, and Hoffman's claims against Landis & Gyr are barred by res judicata as well. Landis & Gyr's Motion for Summary Judgment is hereby GRANTED.

Statute of Limitations

Both Burgess and Landis & Gyr argue that they are entitled to partial summary judgment because some of Hoffman's causes of action are barred by applicable statutes of limitations. Because all of Hoffman's claims have been barred by res judicata, this Court does not reach the statute of limitations question presented by Defendants' Motions for Partial Summary Judgment.

SIGNED this 9th day of November, 1994.

/s/ JERRY BUCKMEYER
Jerry Buchmeyer
UNITED STATES DISTRICT JUDGE

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[19] *Dairyland County Mutual Ins. Co. v. Childress*, 650 S.W.2d 770, 773-74 (Tex. 1983).

NO. 91-8513-B

HOFFMAN CONTROLS CORPORATION, *Plaintiff,* VS. BURGESS-SAIA, INC., *Defendant.*	IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS 44TH JUDICIAL DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled and numbered cause came on for trial before the Court without a jury on October 1, 1992. Plaintiff Hoffman Controls Corporation and Defendant Burgess-SAIA, Inc. appeared through their respective attorneys of record. After considering the pleadings, the evidence, and the arguments of counsel, the Court, in response to a request from the Defendant, makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. On October 1, 1992 this case was called to trial as regularly scheduled.

2. Before the close of the Plaintiff's evidence, the Plaintiff took a nonsuit of its case without prejudice pursuant to Rule 162 of the Texas Rules of Civil Procedure.

3. Following the Plaintiff's nonsuit, the Court heard the Defendant's counterclaim.

4. Defendant's counterclaim is founded upon an open account pursuant to Rule 185 of the Texas Rules of Civil Procedure for goods, wares, and merchandise.

5. The Plaintiff did not timely file a written denial of the sworn account under oath.

6. Defendant's counterclaim was actually litigated and finally adjudicated on the pleadings.

7. On or about November 6, 1990, plaintiff ordered from defendant certain personal property consisting of 500 motor gear box assemblies.

8. On or about December 20, 1990, Defendant delivered and Plaintiff received, all of the above-described motor gear box assemblies.

9. The reasonable cash market value of the motor gear box assemblies in Dallas County, Texas, on the day of delivery was $10,025.00, and said amount is the usual and customary amount charged by the Defendant for said assemblies.

10. The price the Plaintiff agreed to pay for the motor gear box assemblies was $10,025.00.

11. The defendant kept a systematic record on the above-described transaction on the Plaintiff's account. The amount due and owing on the account after all just and lawful offsets, payments and credits have been allowed is $10,025.00.

CONCLUSIONS OF LAW

1. Defendant is entitled to judgment against the Plaintiff.

2. The Plaintiff is indebted to the Defendant for the sum of $10,025.00 for actual damages.

3. The Plaintiff is indebted to the Defendant for the sum of $550.40 for prejudgment interest.

4. The indebtedness of the Plaintiff to the Defendant shall bear interest at the rate of 10 percent per annum from October 9, 1992, until paid.

5. The Plaintiff shall pay all costs of Court expended or incurred in this cause.

Signed this 2nd day of November, 1992.

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HON. CANDACE TYSON

NO. 91-8513-B

HOFFMAN CONTROLS CORPORATION, *Plaintiff,* VS. BURGESS-SAIA, INC., *Defendant.*	IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS 44TH JUDICIAL DISTRICT

JUDGMENT

On the 1st day of October, 1992, came on to be heard the above-entitled and numbered cause. Plaintiff Hoffman Controls and Defendant Burgess-SAIA, Inc. appeared through their respective attorneys of record. No jury having been demanded, all questions of fact were submitted to the Court.

The Court, having considered the Plaintiff's request to take a Non-Suit before the close of the Plaintiff's evidence, finds that the request should be granted. The Plaintiff's claims are, therefore, non-suited without prejudice pursuant to Rule 162 of the Texas Rules of Civil Procedure.

The Court then considered the Defendant's Counterclaim for affirmative relief. After considering the pleadings on file and the arguments of counsel, the Court is of the opinion that the Defendant is entitled to recover of and from the Plaintiff on Defendant's Counterclaim the sum of $10,025.00.

IT IS THEREFORE ORDERED that Burgess-SAIA, Inc. have and recover actual damages from Hoffman Controls Corporation the sum of Ten Thousand Twenty-five Dollars ($10,025.00), plus prejudgment interest, calculated at the rate of 6 percent per annum, in the amount of Five Hundred Fifty Dollars and 40/100 ($550.40).

IT IS FURTHER ORDERED that the Judgment here rendered shall bear interest at the rate of 10% from October 9, 1992, until paid. All costs of court expended or incurred in this cause are adjudged against Plaintiff, Hoffman Controls Corporation. All writs and processes for the enforcement and collection of this Judgment or the costs of court may issue as necessary. All other relief not expressly granted is denied.

SIGNED this 9th day of October, 1992.

/s/ CANDACE TYSON

HON. CANDACE TYSON

Rule 56. Summary Judgment

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing and may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy and what material facts are actually and in good faith controverted. It shall

thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) *When Affidavits are Unavailable.* Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavit Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party

employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.